

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
TV Communications Network, Inc.)
Petition to Stay Pending Review by)
the Appellate Court)

ORDER

Adopted: February 7, 2012

Released: February 8, 2012

By the Chief, Wireless Telecommunications Bureau:

1. In this Order, the Wireless Telecommunications Bureau (“Bureau”) denies a petition for stay filed by TV Communications Network, Inc. (“TVCN”). TVCN seeks to stay further Commission action to implement three previous orders that upheld the automatic cancellation of licenses formerly held by TVCN. We deny TVCN’s petition because it fails to meet established Commission criteria for issuance of a stay.

I. BACKGROUND

2. TVCN defaulted on its obligation to make timely installment payments to the Commission for fourteen Broadband Radio Service (“BRS”) licenses¹ awarded based on an auction that ended in 1996.² Under the Commission’s installment payment rules,³ the fourteen licenses cancelled automatically as a result of TVCN’s defaults.⁴ TVCN requested a waiver of the automatic cancellation rule,⁵ and the

¹ The Broadband Radio Service was originally called the Multipoint Distribution Service (“MDS”), and TVCN’s licenses were for MDS spectrum. However, in 2004, the Commission renamed MDS as BRS. *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). Accordingly, in this order we refer to the service by its current name of BRS.

² The BRS licenses held by TVCN were for the following markets: Clarksburg-Elkins, WV (MDB082), Dickinson, ND (MDB113), Fairmont, WV (MDB137), Logan, WV (MDB259), Morgantown, WV (MDB306), Salina, KS (MDB396), San Luis Obispo, CA (MDB405), Scottsbluff, NE (MDB411), Scranton-Wilkes Barre, PA (MDB412), Steubenville, OH (MDB431), Stroudsburg, PA (MDB435), Watertown, NY (MDB463), Wheeling, WV (MDB471), and Williston, ND (MDB476). *See* TV Communications Network, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, *Order*, 22 FCC Rcd 1397, 1397 n.1, 1398-1402 ¶¶ 3-8 (WTB 2007) (“*TVCN Order*”) (providing a detailed background of this matter); *see also* Alpine PCS, Inc., Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses, *Memorandum Opinion and Order*, 25 FCC Rcd 469, 478 ¶ 13 (2010) (“*Installment Payment Order*”), *aff’d*, *Alpine PCS, Inc. v. FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010), *reh. denied*, No. 10-1020 (D.C. Cir. Feb. 10, 2011).

³ *See* 47 C.F.R. § 1.2110(f)(4)(iv) (1999); 47 C.F.R. § 1.2110(g)(4)(iv) (2002).

⁴ *See TVCN Order*, 22 FCC Rcd at 1398 ¶ 2, 1400-01 ¶¶ 6-7; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

⁵ *See TVCN Order*, 22 FCC Rcd at 1398 ¶ 2, 1409 ¶ 24; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

Bureau denied its request.⁶ TVCN subsequently filed an application for review seeking reversal of the Bureau's denial.⁷

3. While TVCN's application for review was pending, the Commission conducted Auction 86, which offered seventy-eight BRS licenses, including fourteen new licenses for the spectrum that had been covered by TVCN's cancelled licenses.⁸ Ten of the fourteen licenses received winning bids in Auction 86 and the winning bidders submitted long-form applications for those ten licenses.⁹ TVCN did not file petitions to deny the long-form applications for those ten licenses or otherwise challenge the results of Auction 86.

4. In a memorandum opinion and order released January 5, 2010, the Commission denied TVCN's application for review.¹⁰ On February 18, 2010, two weeks after the statutory thirty-day deadline for filing a petition for reconsideration,¹¹ TVCN filed a petition seeking an extension of the filing deadline and reconsideration of the *Installment Payment Order*.¹² The Commission denied the petition for extension of the deadline in an order on reconsideration released October 14, 2011, on the grounds that its discretion to extend the statutory filing deadline is narrowly limited and that TVCN did not "present the 'extraordinary circumstances' required for [the Commission] to consider a petition for

⁶ See *TVCN Order*, 22 FCC Rcd at 1408-09 ¶¶ 23, 24; *Installment Payment Order*, 25 FCC Rcd at 478 ¶ 13.

⁷ TV Communications Network, Inc., Request for Waiver of Installment Payment Rules for Auction No. 6 and Reinstatement of Licenses, Application for Review, filed Feb. 28, 2007. TVCN later filed a supplement to its application for review. TV Communications Network, Inc., Supplement to Application for Review, filed Mar. 20, 2007 ("TVCN Supplement").

⁸ See Auction of Broadband Radio Service (BRS) Licenses Scheduled for October 27, 2009; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC 8277 (WTB 2009).

⁹ See Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, *Public Notice*, 24 FCC Rcd 13572 (WTB 2009). The ten BRS licenses won by participants in Auction 86 were for the following markets: Clarksburg-Elkins, WV (BR-BTA082), Fairmont, WV (BR-BTA137), Morgantown, WV (BR-BTA306), Salina, KS (BR-BTA396), San Luis Obispo, CA (BR-BTA405), Scranton-Wilkes Barre, PA (BR-BTA412), Steubenville, OH (BR-BTA431), Stroudsburg, PA (BR-BTA435), Watertown, NY (BR-BTA463), and Wheeling, WV (BR-BTA471). *Id.* Seven of these licenses have been granted, with action pending on the other three. See FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (FCC 601), File Nos. 0004041315 and 0004040539 (publicly available through the Commission's Universal Licensing System website, <http://wireless.fcc.gov/uls/>).

¹⁰ *Installment Payment Order*, 25 FCC Rcd at 510 ¶ 93. The Commission also dismissed TVCN's late-filed Supplement. *Id.* at 479-80 ¶ 16 & nn.86 and 90, 510 ¶ 93; see 47 C.F.R. § 1.115(d).

¹¹ Section 405(a) of the Communications Act, as amended, provides that a "petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." 47 U.S.C. § 405(a). Section 1.106(f) of the Commission's rules implements section 405(a) and provides that the "petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action." 47 C.F.R. § 1.106(f).

¹² TV Communications Network, Inc., Petition for (A) Extension of Time, and (B) Reconsideration of Order FCC 10-1 Re Application for Review, filed Feb. 18, 2010 ("Petition for Reconsideration").

reconsideration filed after the statutory deadline.”¹³ Accordingly, the Commission also dismissed the Petition for Reconsideration.¹⁴

5. On November 9, 2011, TVCN filed the one-page petition before us requesting that the Commission stay the enforcement of the *TVCN Order*, the *Installment Payment Order*, and the *Order on Reconsideration* and refrain from selling the fourteen BRS licenses that were the subject of those orders pending appellate review of the orders.¹⁵ On November 14, 2011, TVCN filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit.¹⁶

II. DISCUSSION

6. In support of its request for a stay, TVCN rests its entire argument on the mere statement that a stay “should not impair the interest of the FCC or the public” and a claim that if it prevails in court it will sell its licenses or obtain financing to pay its outstanding debt owed to the Commission and “expedite the introduction of [service] to the public.”¹⁷ TVCN also refers generally to assertions it made in previous submissions that it has assurances from a third party buyer that the third party will pay TVCN’s debt to the Commission and “expedite the introduction of . . . Service to the public.”¹⁸

7. To qualify for the extraordinary remedy of a stay, TVCN has the burden of demonstrating that: (i) TVCN is likely to prevail on the merits; (ii) TVCN would suffer irreparable harm, absent a stay; (iii) other interested parties would not be harmed if the stay is granted; and (iv) the public interest would favor a grant of the stay.¹⁹ For the reasons discussed below, the Bureau finds that TVCN fails to meet this standard.

8. First, TVCN does not claim, let alone establish, that it is likely to prevail in the Court of Appeals. Section 402(c) of the Communications Act requires a party appealing a FCC licensing order such as the *Installment Payment Order* to file a notice of appeal within thirty days of the date of public notice of that order.²⁰ TVCN filed its appeal of the *Installment Payment Order* over nineteen months after the deadline for appealing that order had passed.²¹ The Court of Appeals thus is likely to dismiss

¹³ TV Communications Network, Inc., Request for Waiver of the Installment Payment Rules and Reinstatement of Licenses, *Order on Reconsideration*, 26 FCC Rcd 14891, 14893-94 ¶ 8 (2011) (“*Order on Reconsideration*”).

¹⁴ *Id.*

¹⁵ TV Communications Network, Inc., Petition to Stay Pending Review by the Appellate Court Re: Orders DA 07-315, FCC 10-1, and FCC-11-154, filed November 9, 2011 (“Petition to Stay”).

¹⁶ *TV Communications Network, Inc. v. FCC*, Petition for Review, No. 11-1443 (D.C. Cir., filed Nov. 14, 2011).

¹⁷ See Petition to Stay at 1.

¹⁸ See *id.*

¹⁹ Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Third Memorandum Opinion and Order, Third Further Notice of Proposed Rule Making and Order*, 19 FCC Rcd 25045, 25063 ¶ 43 (2004). See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

²⁰ 47 U.S.C. § 402(c).

²¹ The FCC gave public notice of the *Installment Payment Order* on January 5, 2010, the date the order was released. See 47 C.F.R. § 1.4(b)(2). Accordingly, the thirty-day window prescribed by section 402(c) for filing a notice of appeal from the *Installment Payment Order* closed on February 4, 2010. See 47 U.S.C. § 402(c). TVCN did not file its notice of appeal from the *Installment Payment Order* until November 14, 2011 — more than nineteen months past the statutory deadline. See *TV Communications Network Inc. v. FCC*, Petition for Review, No. 11-1443 (continued....)

summarily TVCN's appeal of the *Installment Payment Order* for lack of jurisdiction. Moreover, the Court of Appeals has upheld the Commission's strict enforcement of its automatic cancellation rule in several cases, including a case in which the court denied an appeal of the *Installment Payment Order* against a challenge by a former licensee that had defaulted on its installment payment obligations.²² TVCN has not provided any facts or arguments that would suggest that the court would reach a different result if it were to adjudicate TVCN's appeal. TVCN also is unlikely to convince the Court of Appeals to overturn the *Order on Reconsideration*. As described in that order, the Commission has no discretion to extend the statutory filing deadline in the absence of "extraordinary circumstances[.]" as narrowly defined by the courts.²³ The Commission properly dismissed TVCN's Petition for Reconsideration which had been filed two weeks after the statutory deadline because TVCN had not shown the "extraordinary circumstances" needed to justify an extension of the section 405 deadline.

9. Second, TVCN does not allege, let alone show, that it will suffer irreparable injury in the absence of a stay. Therefore, TVCN has failed to plead, much less satisfy, the second criteria for granting a stay.²⁴

10. Third, TVCN does not claim that third parties will not be harmed if the stay is granted, let alone demonstrate an absence of such injury. Thus, TVCN does not satisfy the third criteria for granting a stay.²⁵

11. Fourth, TVCN has failed to show that the public interest would be furthered by the grant of a stay. The automatic cancellation rule safeguards the integrity of the auction and licensing process by ensuring that entities that have won licenses at auction on the promise of full payment of the winning bid remain willing and able to fulfill their payment obligations.²⁶ Strict application of the automatic cancellation rule advances the public interest, especially when, as in this case, doubts have been raised regarding a defaulter's ability and willingness to satisfy its outstanding payment obligations.²⁷ Thus, even if a stay of the *Installment Payment Order* could reverse the automatic cancellation of TVCN's licenses, such action would not be in the public interest.²⁸ Granting a stay of the Commission's decision to dismiss

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(D.C. Cir., filed Nov. 14, 2011). The Commission has filed a motion to dismiss TVCN's appeal which is pending before the court. See *TV Communications Network, Inc. v. FCC*, Motion of the Federal Communications Commission for Dismissal in Part and for Summary Affirmance in Part, No. 11-1443 (D.C. Cir., filed Dec. 22, 2011).

²² *Alpine PCS, Inc. v. FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010), *reh. denied*, No. 10-1020 (D.C. Cir. Feb. 10, 2011). See *Morris Communications v. FCC*, 566 F.3d 184, 186 (D.C. Cir. 2009).

²³ See 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f). See also *Order on Reconsideration*, 26 FCC Rcd at 14893 ¶ 6 (citing *Gardner v. FCC*, 530 F.2d 1086, 1091-92 & n.24 (D.C. Cir. 1976) and *Virgin Islands Telephone Corp. v. FCC*, 989 F.3d 1231, 1237 (D.C. Cir. 1993)).

²⁴ The Commission and courts have consistently found no irreparable harm where petitioners have sought to stay auctions and post-auction licensing proceedings based on matters pending before the Commission regarding petitioners' claims to the licenses offered at auction. See, e.g., *Alpine*, 23 FCC Rcd 10485, 10490 ¶ 18 (2008) (citing *FCC v. Radiophone, Inc.*, 516 U.S. 1301, 116 S.Ct. 283 (1995)).

²⁵ TVCN fails to address even the possible harm to entities that won licenses in Auction 86 for spectrum formerly associated with licenses held by TVCN.

²⁶ See *Installment Payment Order*, 25 FCC Rcd at 481 ¶ 19.

²⁷ *Id.* at 486-88 ¶¶ 28-29.

²⁸ TVCN's licenses were cancelled automatically by operation of the Commission's rules. Therefore, the stay TVCN requests would not reinstate the licenses because reinstatement would require reversal of the Commission's orders, rather than a stay of them.

TVCN's late-filed Petition for Reconsideration would also disserve the public interest and create uncertainty for the auction process. Strict adherence to filing deadlines furthers the public interest because it ensures administrative finality. We have recognized that "administrative finality in licensing matters advances the public interest" because it "promotes the prompt initiation of service without undue delay."²⁹ Administrative finality is particularly important in this case because new licenses for most of the spectrum associated with the cancelled licenses have been subsequently won at auction by other parties. Moreover, TVCN has failed to explain how granting the requested stay will expedite the deployment of service to the public. Thus, granting a stay of the *Order on Reconsideration* would disserve the public interest because it would contravene an important statutory filing deadline without justification, unnecessarily delay an already lengthy adjudicative process, and create administrative uncertainty.

12. For the reasons discussed above, TVCN has failed to satisfy the standard for obtaining a stay. Accordingly, we deny TVCN's Petition to Stay.

III. CONCLUSION

13. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 303(r), and 309(j)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309(j)(3) and the authority delegated pursuant to sections 0.131(c) and 0.331 of the Commission's rules, as amended, 47 C.F.R. §§ 0.131(c), 0.331, the Petition to Stay Pending Review by the Appellate Court filed by TV Communications Network, Inc. on November 9, 2011, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Rick Kaplan
Chief, Wireless Telecommunications Bureau

²⁹ See *Hamshire Fannett High School, Folkston Middle School, Louisiana State University and Mechanical & Agricultural College, Autauga County Public School System, Rotan Independent School District, Chippewa Valley Technical College, Roby Consolidated Independent School District, Palmer School District #49, Order on Reconsideration*, 24 FCC Rcd 8068, 8070 ¶ 8 (WTB 2009).